UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

EDWARD J. ANDRESS,	:	
Plaintiff,	:	
v.	:	ORDER DENYING PLAINTIFF'S MOTION TO VACATE VOID JUDGMENT
POSTMASTER GENERAL, MARVIN T. RUNYON	:	
Defendant.	:	

This matter is before the Court on the Plaintiff's motion to vacate void judgment (doc. 26), a supplemental memorandum by the Plaintiff in support of his motion (doc. 33), a motion by the Plaintiff to include the transcript of the administrative hearing (doc. 34), the Defendant's reply (doc. 37), and the Plaintiff's response (doc. 38).

BACKGROUND

The Plaintiff, a former United States Postal Service Worker, filed a claim against his employer with the United States Merit System Protection Board ("MSPB") on August 16, 1991. On November 5, 1991 the MSPB issued its initial decision in opposition to Plaintiff's position. On November 27, 1991 the Plaintiff filed objections to the decision and on December 10, 1991 he filed an official petition to review the decision. On April 22, 1992 the MSPB

denied the petition and informed the Plaintiff of their denial and his right to seek review.

The Plaintiff, Edward Andress, then had the option to file an action before the Equal Employment Opportunity Commission or file a civil action with this Court within thirty calendar days from

receipt of MSPB's notice. 5 U.S.C. § 7703 (b) (1989). On May 15, 1992 Mr. Andress elected the latter by filing Complaint No. C-1-92-417 against the Postal Service and four employees alleging handicap and race discrimination. Subsequently, Andress dismissed the four employees and filed amended complaints. Then on August 21, 1992 the United States Department of Justice filed a suggestion of improper service on the remaining defendant. Finding service improper the Magistrate Judge ordered Mr. Andress to show why the Magistrate should not dismiss his case. The Magistrate Judge then sent Mr. Andress Fed. R. Civ. P. 4 and ordered the Plaintiff to perfect service on Defendant Postmaster General within twenty days of receipt of the order. When Mr. Andress failed to comply, the Magistrate recommended dismissal of his complaint without prejudice. On March 3, 1993 we adopted the report and recommendation. Mr. Andress appealed and the Sixth Circuit affirmed our finding that Mr. Andress had failed to perfect

service of process within 120 days of filing his complaint. Andress v. United States Postal Service, No. 93-3391 (6th Cir. October 21, 1993).

While the Plaintiff's appeal was pending he filed this action containing the same claim. We held, on the Magistrate's recommendation, that filing the complaint again in a new case does not cure a procedural defect. While we understand that the Plaintiff has been proceeding pro se, as we said before, "the Plaintiff's pro se status cannot be viewed as a license to avoid the federal rules of civil procedure as well as the statute of limitations." (doc. 25).

The Plaintiff now moves to vacate the judgment as void. The Plaintiff alleges that dismissal of the case violated his due process rights and that the statute should have been tolled, thus allowing him to re-file.

DISCUSSION

A. Rule 60 (b) (4) motion to void judgment

The Plaintiff, moving pro se in this matter, failed to cite specific authority for his motion. It appears, however, that the Plaintiff has filed a Rule 60(b)(4) motion to set aside a judgment. This rule allows the court to void a judgment that has been rendered without proper jurisdiction of the person

subject matter or deprives an individual due process of the law. United States v. Boch Oldsmobile, Inc., 909 F.2d 657, 661 (1st Cir. 1990); 11 C. Wright & A. Miller, Federal Practice and Procedure § 2862, at 198-200 (1973).

The moving party has a difficult burden to set aside a judgment as void. "A judgment is not void merely because it is or may be erroneous. . . . or because the precedent upon which it was based is later altered or even overruled. A judgment is void . . . [if] the court's action amounts to plain usurpation of power constituting a violation of due process." Id. at 661. Mr. Andress in this case alleges a violation of his due process rights. The fundamental requirement of due process is an opportunity to be heard, and when derelict parties fail to follow court orders they should be notified before being dismissed. Harris v. Callwood, 844 F.2d 1254, 1255-56 (6th Cir. 1988) (citation omitted).

In the instant case, Mr. Andress has been given ample opportunity at every stage of this procedure to be heard. On June 28, 1991, the Plaintiff brought a grievance claim under Article 15 of the National Agreement between the Postal Service and the Mailhandler's Union and subsequently appealed that decision to the MSPB. On August

23, 1991 a hearing was held by the MSPB on the Plaintiff's action. The Adjudicating Official issued the initial decision affirming the agency decision on November 5, 1991. The Plaintiff filed objections on November 27, 1991 and a formal petition for review on December 10, 1991. On April 22, 1992 the MSPB denied Plaintiff's petition for review. This left Plaintiff with the final option to file before the Equal Employment Opportunity Commission or file a civil action with this court. Mr. Andress filed Complaint No. C-1-92-417 with this Court on May 15, 1992. When the Plaintiff failed to follow the proper procedures the Magistrate Judge notified him, sent him a complimentary copy of Rule 4, and gave him 20 days to perfect service, which he failed to do. Through all these procedures it is evident that the Plaintiff had numerous opportunities and took full advantage of most of these opportunities to be heard. Therefore, the Court finds there has been no violation of due process.

B. Equitable Tolling

The Plaintiff also claims that equitable tolling should apply in this case. Chapter 5 of the United States Code, section 7703, governs judicial review of decisions of the MSPB. 5 U.S.C. § 7703 (b) (2) provides in pertinent part:

> Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the civil Rights Act of 1964 . . . . Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(emphasis added). Mr. Andress alleges that the 30 day period is subject to equitable tolling, and thus, his filing of the second action was timely. We disagree.

The Sixth Circuit has held that

> [T]he 30 day limitations period for filing an appeal under 5 U.S.C. § 7703(b)(2) is a jurisdictional prerequisite to judicial review of an MSPB decision and cannot be extended. Thus, once the appellant failed to file his action within the 30 day limitation period, the district court properly dismissed the case for lack of jurisdiction.

Dean v. Veterans Admin., 943 F.2d 667, 669 (6th Cir. 1991) (quoting Hilliard v. United States Postal Service, 814 F.2d 325, 327 (6th Cir. 1987) (holding that a person who filed on the 31st day (Monday) because Sunday was the 30th day failed to meet the jurisdictional requirements and tolling was not appropriate)).

In Dean, the Sixth Circuit held this but then reversed the district court on other grounds. In that case the Plaintiff was proceeding in forma pauperis and was in the courthouse with complaint in hand before the thirty day period expired. 943 F.2d at 670. Mr. Dean, however, was at the mercy of the court because his complaint could not be immediately accepted for filing since he sought to file his complaint in forma pauperis. The Sixth Circuit found that Mr. Dean did all he could to comply with the statute,

but was at the mercy of the court's speed and this caused him to miss the deadline. Id. The Sixth Circuit held "that a complaint is filed when it along with an application to proceed in forma pauperis are presented to the clerk's office and the clerk's office takes possession of the complaint and the application is granted." Id. at 671. Therefore, while the Sixth Circuit reversed they did not find that there should be equitable tolling.

Furthermore, the present case is distinguishable. Mr. Andress had ample opportunity to originally file his complaint and did within the thirty day limitation. In fact, when he failed to properly serve the parties the Magistrate Judge granted him an extra twenty days to perfect service. Now

Mr. Andress is attempting to file his complaint for a second time well past the thirty day limit, because he erred in his first attempt. The Federal Rules of Civil Procedure were created to be followed by all litigants, those represented by counsel as well as those preceding pro se. Mr. Andress ignored the Magistrate Judge's request the first time around and now seeks to get around it by refiling his complaint. In Dean, the Sixth Circuit found that the Plaintiff filed on time, while Mr. Andress second complaint is not anywhere close to timely. Because there is no equitable tolling of the statute, Mr. Andress second complaint must be dismissed. Furthermore, even if there was equitable tolling, it would not apply where the Plaintiff ignores a Court's order to follow the rules and then once his case is dismissed proceeds to re-file it.

CONCLUSION

Accordingly, the Court finds that under Rule 60(b) (4) of the Federal Rules of Civil Procedure this Court had both personal jurisdiction and subject matter jurisdiction. Additionally, the Court finds that the Plaintiff has been given numerous opportunities to be heard; and therefore, the Plaintiff's right to due process of law has not been violated. Finally, the Court finds that equitable tolling does not apply to

5 U.S.C. § 7703(b) (2), and even if the statute could be tolled, the Plaintiff would not be entitled to it in this case.

Therefore, we conclude that the Plaintiff's motion to vacate void judgment (doc. 26) should be DENIED, and this action is hereby DISMISSED.

SO ORDERED.

Dated: Oct. 18, '94

/s/ S. Arthur Spiegel
United States District Judge